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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited-liability company,

Plaintiff,

v.

REALTY ONE GROUP, INC., a Nevada corporation; DAVID TINA, an individual; and MICHAEL J. NELSON, an individual,

Defendants.

Case No.: 2:10-cv-01036-LRH-PAL

RIGHTHAVEN LLC'S RESPONSE TO REALTY ONE GROUP, INC.'S MOTION TO SET ASIDE DEFAULT

Righthaven LLC (“Righthaven”) hereby responds to Defendant Realty One Group, Inc.’s (“Realty One”) Motion to Set Aside Default (Doc. # 21). Righthaven’s response is made and based upon the below Memorandum of Points and Authorities, the pleadings on record, and any oral argument of counsel permitted by the Court.

Dated this seventeenth day of January, 2011.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

While Righthaven certainly contests Realty One’s contention that it was not properly served with the Summons and Complaint through its registered agent and that Realty One has meritorious affirmative defenses of implied license and *de minimis* infringement, this Court’s October 18, 2010 Order (the “October 18th Order”), which found that Defendant Michael J. Nelson’s (“Mr. Nelson”) unauthorized use of Righthaven-owned copyrighted material constituted fair use as a matter of law (Doc. #17 at 3-4.), relief from entry of default is appropriate. Moreover, while Righthaven respectfully disagrees with the Court’s fair use analysis undertaken in dismissing Mr. Nelson from this case, as argued below, Realty One is equally entitled to dismissal based on the findings of fact and conclusions of law reached in the October 18th Order. While Righthaven’s position may seem unusual given the amount of unwarranted criticism that has been directed toward it in various court filings, newspaper articles and Internet postings, the company and its counsel fully respect and honor the ethical obligations that come with the privilege of practicing before this Court. It is with these ethical obligations in mind, which includes the duty of candor, that Righthaven must inform this Court of decisional law that supports granting Realty One relief from entry of default and further supports dismissing the claims against it in view of the October 18th Order. Righthaven maintains that this approach, while facially unconventional, is wholly consistent with its conduct in litigating all other matters pending within this judicial district.

II. FACTS

On June 25, 2010, Righthaven filed its Complaint against Realty One, David Tina, and Mr. Nelson.[1] (Doc. # 1.) Service of the Summons on Realty One was effectuated on June 30, 2010. (Doc. # 10.) On October 6, 2010, the Clerk of this Court entered default against Realty One. (Doc. #16.) The Court dismissed Mr. Nelson from the action based on the defense of fair use on October 18, 2010. (Doc. #17 at 3-4.) Over two months after Mr. Nelson's dismissal, Realty One moved to set aside the default entered against it. (Doc. # 21.) As argued below, Righthaven maintains that Realty One should be granted relief from the default and, in fact, should be entitled to the benefit of the Court's October 18th Order.

III. ARGUMENT

A. *Even Though Righthaven Maintains the Court's October 18th Order Was Legally And Factually in Error, Realty One is Entitled to The Benefit of Mr. Nelson's Dismissal.*

Righthaven strenuously maintains the Court erred in dismissing Mr. Nelson from this case by finding his infringing conduct was protected by the defense of fair use. Righthaven, however, respects the Court's October 18th Order, even though it disagrees with its fair use

[1] The Court issued a Minute Order in which it advised of its intent to dismiss Defendant David Tina pursuant to Federal Rule of Civil Procedure 4(m) ("Rule 4(m)") in view of Righthaven's inability to effectuate service of process. (Doc. # 18.) The Minute Order has set Mr. Tina dismissal pursuant to Rule 4(m) to occur on or after December 2, 2010. (*Id.*) Righthaven does not oppose the dismissal of Mr. Tina from this action pursuant to Rule 4(m). Accordingly, the Court may enter Mr. Tina's dismissal pursuant to Rule 4(m).

analysis. In fact, Righthaven, in recognition of its duty of candor to this Court, asserts that Realty One is entitled to the benefit of the October 18th Order.

Decisions from a variety of jurisdictions, including the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"), support the proposition that even a non-appearing party in an action may be entitled to benefit from an order or decision so as to avoid an inconsistent adjudication on the merits. *See Frow v. De La Vega*, 82 U.S. 552, 554 (1872); *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532-33 (9th Cir. 2001); *Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001); *Gulf Coast Fans, Inc. v. Midwest Elecs. Imp., Inc.*, 740 F.2d 1499, 1512 (11th Cir. 1984); *United States v. Peerless Ins. Co.*, 374 F.2d 942, 944-45 (4th Cir. 1967); *Jefferson v. Briner, Inc.*, 461 F. Supp. 2d 430, 433-36 (E.D. Va. 2006); *Barnes v. Boyd*, 8 F. Supp. 584 (S.D. W. Va. 1934); 10A C. Wright & A. Miller, *Federal Practice and Procedure*, § 2690 (2007); 6 Moore, *Federal Practice*, ¶ 55.06.

The Ninth Circuit, consistent with holdings in other circuits, has held that a defaulted defendant may benefit from a favorable adjudication on the merits where the defaulted defendant would have had a closely related defense or was otherwise similarly situated with the appearing defendants so as to avoid the possibility of inconsistent judgments against all defendants. *In re First T.D. & Inv., Inc.*, 253 F.3d at 532; *accord Lewis*, 236 F.3d at 768; *Gulf Coast Fans*, 740 F.2d at 1512. Courts have expressly held that defaulted defendants are entitled to the benefits received from an appearing defendant dismissal or summary judgment of a plaintiff's claims. *See Davis v. National Mortgagee Corp.*, 349 F.2d 175 (2d Cir. 1965) (applying rule to a successful motion for summary judgment); *Barnes*, 8 F. Supp. 584 (applying rule to a successful motion to dismiss).

Application of the above decisions to the facts before the Court supports the conclusion that Realty One is entitled to the benefit of the October 18th Order for purposes of deciding whether to set aside entry of default. Moreover, the above cases certainly empower the Court to dismiss Righthaven's claims against Realty One based on the October 18th Order. In fact, given that Realty One faces identical infringement claims against it as did Mr. Nelson, the Court may rely on the October 18th Order to support dismissing Realty One without any additional fair use analysis. Righthaven maintains that, despite its view that the Court erred in its decision, Realty One is nevertheless entitled to the benefit of the October 18th Order.

B. Righthaven Concedes That Realty One Has "Good Cause" For Setting Aside The Default in View of The Court's October 18th Order.

As correctly noted by Realty One in its moving papers, Federal Rule of Civil Procedure 55(c) ("Rule 55(c)") authorizes the Court to "set aside an entry of default for good cause . . . ." (Doc. # 21 at 4.) This standard grants broader discretion and greater procedural flexibility to afford relief from default than from entry of a default judgment. *See Brady v. United States*, 211 F.3d 499, 504 (9th Cir. 2000). Righthaven concedes that Realty One has demonstrated "good cause" for relief from entry of default in view of its entitlement to the benefits conferred by the Court's October 18th Order.

In determining whether "good cause" exists for relief from entry of default under Rule 55(c), the following factors are considered: (1) whether the plaintiff will be prejudiced by the reopening of the action; (2) whether the party seeking relief has a meritorious defense that might make the result at trial different from that reached by default; and (3) whether default resulted from culpable conduct by the party seeking relief. *See TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001).

With regard to the first factor, "[t]here is no prejudice to the plaintiff where setting aside of the default has done no harm to the plaintiff except to require it to prove its case." *Lacy v. Sitel Corp.*, 227 F.3d 290, 293 (5th Cir. 2000); *accord TCI Group Life Ins. Plan*, 244 F.3d at 701. Here, Righthaven's infringement claims against Mr. Nelson were dismissed by virtue of the Court's October 18th Order. Righthaven maintains this decision was legally and factually in error. However, as set forth above, Realty One is entitled to the benefit of the October 18th Order. As such, Righthaven would suffer no prejudice by setting aside the default because the Court has already adjudicated the merits of the infringement claims at issue in this case through its decision dismissing Mr. Nelson on fair use grounds. Accordingly, Righthaven concedes that the first factor supports setting aside entry of default as requested by Realty One in view of the October 18th Order.

With regard to the second factor, the moving party bears the burden of demonstrating a defense that may result in a different outcome at trial than that obtained by entry of default. *See Hawaii Carpenters' Trust Funds v. Stone,* 794 F.2d 508, 513 (9th Cir. 1986). Under this standard, the moving party is not required to demonstrate that it will prevail on the asserted defense, only that there is a *bona fide* chance that such a result could occur. *See Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984). As with the first factor, this factor also supports granting Realty One relief from entry of default given the Court's October 18th Order. While Righthaven disputes the merits of Realty One's alleged implied license and *de minimis* infringement contentions (Doc. # 21 at 8-10), engaging in a substantive analysis of these defenses is unnecessary given the October 18th Order. In fact, as argued earlier, Realty One is entitled to the benefits of the adjudication on the merits obtained in favor of Mr. Nelson by virtue of the Court's October 18th Order. Accordingly, Righthaven concedes that the second factor supports setting aside entry of default as requested by Realty One in view of the October 18th Order.

The third factor under Rule 55(c) considers whether default resulted from the moving party's culpability. *See TCI Group Life Ins. Plan*, 244 F.3d at 698. In this regard, "culpability" has been defined to mean "inexcusable neglect." *Id.* Failing to respond to a complaint after service may fail to constitute inexcusable neglect where the moving party offers a "credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision making, or otherwise manipulate the legal process." *Id.* at 697. In this case, while Righthaven maintains that it properly served the Summons and Complaint on Realty One's designated resident agent, it would not be unreasonable to assume that its agent failed to forward these documents or otherwise inform Realty One that responsive action needed to be taken. Righthaven certainly is not in any position to present contrary evidence on this point. Moreover, even if the Court were to deny Realty One relief from entry of default, entry of a default judgment in Righthaven's favor would likely be precluded based on application of the October 18th Order. *See Frow*, 82 U.S. at 554; *In re First T.D. & Inv., Inc.*, 253 F.3d at 532-33; *Lewis*, 236 F.3d at 768; *Gulf Coast Fans, Inc.*, 740 F.2d at 1512; *Peerless Ins. Co.*, 374 F.2d at

944-45; *Jefferson*, 461 F. Supp. 2d at 433-36; *Barnes*, 8 F. Supp. at 584. Thus, the record before the Court supports a finding of excusable neglect by Realty One, thereby satisfying the third factor required for relief from entry of default.

IV. CONCLUSION

As argued above, Righthaven maintains that Realty One is entitled to the benefit of the Court's October 18th Order, which dismissed the infringement claims asserted against Mr. Nelson on fair use grounds. In view of Realty One's entitlement to the benefits of this decision, Righthaven concedes that relief from entry of default is warranted. Moreover, Righthaven further maintains that Realty One's entitlement to the benefit of the October 18th Order should extend to a dismissal of the infringement claims against it without the need for any additional fair use analysis by the Court beyond that already set forth in its prior decision.

Dated this seventeenth day of January, 2011.

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CERTIFICATE OF SERVICE

Pursuant to LR 5-4, I hereby certify that a true and correct copy of the foregoing document was served via the Court's CM/ECF system on January 17, 2011 on the following counsel of record:

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